

UNITED STATES DISTRICT COURT  
DISTRICT OF PUERTO RICO

HIRAM REYES SIERRA, et al.,

Plaintiffs,

v.

ADMINISTRACION PARA EL SUSTENTO  
DE MENORES (ASUME), et al.,

Defendants.

Civil No. 06-1391 (JAF)

**OPINION AND ORDER**

Plaintiffs, Hiram Reyes Sierra ("Reyes"), Luz C. Rosario, and their conjugal partnership, bring this tort action under Puerto Rico law, 31 L.P.R.A. § 5141 (2004) ("Article 1802") and 31 L.P.R.A. § 5142 (2004) ("Article 1803"). Defendant Social Security Administration now moves to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure. Docket Document No. 8-1. Plaintiffs have not opposed the motion.

**I.**

**Factual and Procedural History**

Plaintiff Reyes receives a monthly check from the Social Security Administration (SSA) for \$419.70. Docket Document 5-3. In January and February 2006, SSA withheld \$54.50 from Reyes' checks and sent these amounts to ASUME for Héctor Escribano, whom SSA mistakenly believed to be Reyes' biological son. Id. Plaintiffs promptly informed both SSA and ASUME of the error and in

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1 March 2006, SSA effectively terminated the garnishment. Docket  
2 Document 8-2. Reyes has received the full amount of his monthly  
3 checks since that date. Id. SSA has not reimbursed Reyes for the  
4 \$109 withheld from his checks in January and February.

5 Plaintiffs filed a complaint in a local Puerto Rico court on  
6 March 15, 2006, requesting a permanent injunction prohibiting SSA  
7 from garnishing his future wages and \$100,000 in damages. Docket  
8 Document 5-3. Plaintiffs have not filed an administrative claim  
9 with SSA. Docket Document 8-3.

10 Defendants removed the case to federal court on April 19,  
11 2006, citing federal courts' jurisdiction over actions against  
12 United States agencies such as SSA. Docket Document No. 1-1.

13 Defendant SSA filed a motion to dismiss Plaintiffs' complaint  
14 on June 6, 2006, arguing that the court has no subject matter  
15 jurisdiction over the case because it is moot. Docket Document  
16 No. 8-1. Defendant also argues that Plaintiffs' complaint must be  
17 dismissed because: it is barred by sovereign immunity; it does not  
18 name the United States as a defendant; and Plaintiffs failed to  
19 exhaust administrative remedies as required by the Federal Tort  
20 Claims Act, 28 U.S.C. § 2671 (2006) (FTCA), the federal law that  
21 would govern this dispute were it properly pled. Id.

22 **II.**

23 **Motion to Dismiss Standard under Rule 12(b)(1)**

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1 Under Rule 12(b)(1), a defendant may move to dismiss an action  
2 against him for lack of federal subject matter jurisdiction. See  
3 Fed. R. Civ. P. 12(b)(1) (1992 & Supp. 2004). The party asserting  
4 jurisdiction has the burden of demonstrating its existence. See  
5 Skwira v. United States, 344 F.3d 64, 71 (1st Cir. 2003) (citing  
6 Murphy v. United States, 45 F.3d 520, 522 (1st Cir. 1995)).

7 Rule 12(b)(1) is a "large umbrella, overspreading a variety of  
8 different types of challenges to subject-matter jurisdiction,"  
9 including ripeness, mootness, the existence of a federal question,  
10 diversity, and sovereign immunity. Valentin v. Hosp. Bella Vista,  
11 254 F.3d 358, 362-63 (1st Cir. 2001). A moving party may mount a  
12 "sufficiency challenge," taking the plaintiff's "jurisdictionally-  
13 significant facts as true" and requiring the court to "assess  
14 whether the plaintiff has propounded an adequate basis for  
15 subject-matter jurisdiction." Id. at 363. Alternatively, when the  
16 jurisdictional facts are distinct from the case's merits, a moving  
17 party can bring a "factual challenge," in which case the court  
18 addresses "the merits of the jurisdictional claim by resolving the  
19 factual disputes between the parties." Id.

### 20 III.

#### 21 Analysis

22 Defendant argues that Plaintiffs' complaint should be  
23 dismissed as moot. Docket Document No. 8-1. Under Article III,  
24 Section 2 of the U.S. Constitution, federal courts lack

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1 jurisdiction to consider the merits of a case or controversy that  
2 is not live. Powell v. McCormack, 395 U.S. 486, 486 (1969). We  
3 agree that Plaintiffs' request for an injunction has become moot as  
4 a result of the actions already taken by SSA to correct their  
5 error. This leaves only the question of tort damages requested by  
6 Plaintiffs in the amount of \$100,000.

7 Plaintiffs' complaint suffers from three fatal flaws: (1) it  
8 fails to plead a claim under a federal law that waives sovereign  
9 immunity; (2) it does not name the United States as a defendant;  
10 and (3) Plaintiffs did not exhaust their administrative remedies  
11 with the appropriate federal agency before filing suit.

12 Defendant correctly states that the United States cannot be  
13 sued under local law without its consent. United States v.  
14 Mitchell, 463 U.S. 206, 212 (1983). Failure to plead a federal law  
15 waiving the United States' sovereign immunity mandates dismissal.  
16 Carter v. Soc. Sec. Field Office, 2004 U.S. Dist. LEXIS 4693 at \*6  
17 (N.E.D. Ill.) (citing Macklin v. United States, 300 F.3d 814, 819  
18 (7<sup>th</sup> Cir. 2002)). As Plaintiffs make no allegation of consent in  
19 this case, the court could dismiss on the basis of sovereign  
20 immunity alone. However, we are inclined to agree with Defendant's  
21 suggestion that the complaint be construed as a tort claim brought  
22 under the FTCA, which provides for a waiver of immunity under  
23 certain circumstances. Therefore, we proceed to consider whether  
24 Plaintiffs have properly pled an FTCA claim.

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1           The FTCA provides a waiver of immunity for tort claims that  
2 are: (1) against the United States; (2) for money damages; (3) for  
3 injury or loss of property; (4) caused by the negligent or wrongful  
4 act or omission of any government employee; (5) acting within the  
5 scope of his office or employment; (6) "under circumstances where  
6 the United States, if a private person, would be liable to the  
7 claimant in accordance with the law of the place where the act or  
8 omission occurred." 28 U.S.C. § 1346(b). Plaintiffs' complaint  
9 fails to meet the first requirement that it must name the United  
10 States and not a particular agency thereof, such as SSA, as  
11 defendant.<sup>1</sup> Docket Document 5-3. This error constitutes the  
12 second possible grounds for dismissal. FDIC v. Meyer, 510 U.S.  
13 471, 476 (1994).

14           Finally, we observe that although Plaintiffs could amend their  
15 complaint to name the proper defendant, the FTCA's preliminary  
16 requirement that plaintiffs exhaust administrative remedies with  
17 the appropriate federal agency before filing suit also precludes  
18 recovery in this case. 28 U.S.C. § 2675. ("An action shall not be  
19 instituted. . . against the United States for money damages or loss  
20 of property. . . unless the claimant shall have first presented the  
21 claim to the appropriate federal agency and his claim shall have

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<sup>1</sup>The fact that we have singled out one element of an FTCA claim that Plaintiffs have not satisfied should not be construed to mean that we believe that Plaintiffs have properly pleaded the other necessary elements.

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1 been finally denied by the agency"); see also Kokaras v. United  
2 States, 980 F.2d 20, 22 (1<sup>st</sup> Cir. 1992) Corte-Real v. United States,  
3 949 F.2d 484, 485 (1<sup>st</sup> Cir. 1991).

4 **IV.**

5 **Conclusion**

6 In accordance with the foregoing, we **GRANT** Defendant's motion  
7 to dismiss Plaintiff's complaint in its entirety for lack of  
8 subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1).

9 After dismissing the claim against the federal defendant, no  
10 independent grounds for federal jurisdiction remain in this case.  
11 We, therefore, **REMAND** that part of the complaint against ASUME and  
12 Departamento de la Familia to the Puerto Rico Court of First  
13 Instance, Superior Court, Caguas, Puerto Rico, as Civil EPE-2006-  
14 0126 (611).

15 Case closed by judgment of dismissal as to SSA and by remand  
16 as to the remaining defendants.

17 **IT IS SO ORDERED.**

18 San Juan, Puerto Rico, this 27<sup>th</sup> day of September, 2006.

19 S/José Antonio Fusté  
20 JOSE ANTONIO FUSTE  
21 Chief U.S. District Judge